

FILED
09-21-2023
CIRCUIT COURT
DANE COUNTY, WI
2023CV002488
Honorable Frank D.
Remington
Branch 8

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

THE PROBST GROUP, LLC
17035 W. Wisconsin Ave, Ste. 120
Brookfield, WI 53005-5734

Plaintiff,

vs.

Case No. _____

COLONY INSURANCE COMPANY,
8720 Stony Point Pkwy, Ste. 400
Richmond, VA

Case Code: 30701

Defendant.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days after receiving this Summons, you must respond with a written Answer, as that term is used in Wis. Stat. ch. 802, to the Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the statutes. The Answer must be sent or delivered to the Court, whose address is Clerk of Circuit Court, 215 S. Hamilton St., Room 1000, Madison, WI 53703, and to Axley Brynelson, LLP, Plaintiff's attorneys, whose address is 2 E. Mifflin St., Ste. 200, Madison, WI 53703. You may have an attorney help or represent you.

If you do not provide a proper Answer within forty-five (45) days, the Court may grant Judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A

Judgment may be enforced as provided by law. A Judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

If you require the assistance of auxiliary aids or services because of a disability, call (608) 266-4311 and ask for the Court ADA Coordinator.

Dated this 21st day of September, 2023.

AXLEY BRYNELSON, LLP

Electronically signed by Arthur E. Kurtz

Arthur E. Kurtz (SBN: 1003525)

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COMPLAINT

NOW COMES Plaintiff, The Probst Group, LLC, by its attorney, Axley Brynelson, LLP, and for his Complaint against Defendant, Colony Insurance Company, states and alleges as follows:

PARTIES

1. Plaintiff, The Probst Group, LLC, is a domestic limited liability company whose registered agent is Henry Probst and which has a principal office at 17035 W. Wisconsin Ave, Ste. 120, Brookfield, WI 53005-5734.

2. Defendant, Colony Insurance Company, is a foreign corporation domiciled in Virginia and maintaining a principal place of business at 8720 Stony Point Pkwy, Ste. 400, Richmond, VA.

JURISDICTION AND VENUE

3. This is an action for declaratory judgment pursuant to Wis. Stat. § 806.04.

4. Personal jurisdiction exists over Defendant under Wis. Stat. § 801.05(1) and (5) because Defendant is engaged in substantial and not isolated activities within this state and because this action arises out of local services and/or a local contract.

5. Venue is proper in the Dane County Circuit Court under Wis. Stat. § 801.50(2) because Defendant does substantial business in Dane County.

FACTUAL BACKGROUND

6. Plaintiff is the named insured on an Environmental Pollution & Casualty Exposures insurance policy, Policy No. PACE307576 (the “Policy”), issued by Defendant.

7. The Policy’s effective dates were 10/01/2018 through 10/01/2019.

8. Plaintiff contracted with two wastewater treatment facilities, one in Lake Norden, South Dakota (“Lake Norden Facility”) and the other in Littlefield, Texas (“Littlefield Facility”), for digester covers.

9. Plaintiff served solely as general contractor on the two projects and subcontracted the design and installation of the digester covers to Symphonic Water Solutions, Inc. (“Symphonic”).

10. On information and belief, Symphonic designed the digester covers but subcontracted the sourcing of cover materials, fabrication of the covers, and installation to Layfield USA Corporation (“Layfield”).

11. On information and belief, Layfield contracted with the Seaman Corporation (“Seaman”) for the geomembrane material for the covers.

12. Layfield fabricated and installed the covers at the two facilities.

13. Work on the covers was completed by April 2019.

14. Around May of 2019, the covers at both the Lake Norden Facility and the Littlefield Facility began to show signs of material degradation—holes, rips, tears, and leaks—in the membrane material.

15. On information and belief, the physical damage to Seaman's geomembrane materials allows oxygen to penetrate the digester.

16. On information and belief, the mixture of ambient oxygen and methane in the digester poses a serious explosion risk.

17. Attempts to patch the physical damage to the covers proved unsuccessful and unsustainable.

18. Complete replacement of the covers is necessary due to their loss of use resulting from the physical damage to the covers.

19. The physical damage to the covers is caused entirely by the conduct or work performed by Probst's subcontractors.

20. The tears, rips, holes, and leaks in the covers occurred along folds in the geomembrane material.

21. The folds are the result of Layfield and/or Seaman improperly manufacturing, shipping, and handling the geomembrane material.

22. Layfield failed to properly seal the covers during installation.

23. Layfield breached its construction subcontract with Symphonic.

24. On May 9, 2019, Plaintiff sent Defendant a notice of claim related to the damaged covers.

25. Colony has responded with a series of reservation-of-rights letters and, nearly two years after the notice, informed Probst that Colony was denying coverage.

COUNT I: DECLARATORY JUDGMENT
PROPERTY RENTALS

26. Reallege and incorporate by reference all foregoing paragraphs as if fully stated herein.

27. Plaintiff has asserted its right to coverage under the Policy for the property damages related to the defective workmanship on the covers and the resulting physical damage to the covers.

28. The rips, tears, holes, and leaks in the covers are physical damage to tangible property.

29. The rips, tears, holes, and leaks in the covers are the result of defective workmanship by Plaintiff's subcontractors.

30. Neither the rips, tears, holes, and leaks in the covers nor the defective workmanship by Plaintiff's subcontractors were intended, anticipated, or expected.

31. The rips, tears, holes, and leaks in the covers and the defective workmanship by Plaintiff's subcontractors were accidents.

32. The rips, tears, holes, and leaks in the covers occurred after completion of the covers' installation at both facilities.

33. By denying coverage exists, Defendant has demonstrated an interest in contesting Plaintiff's right to coverage for said damages under the Policy.

34. Plaintiff and Defendant have adverse interests in this controversy.

35. Plaintiff's right to coverage under the terms of the Policy is a legally protected interest.

36. This coverage controversy is ripe for judicial determination.

37. Accordingly, Plaintiff is entitled to a declaratory judgment declaring that it does have coverage under the Policy for the physical property damage to the digester covers.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests the following relief:

- a. A judgment declaring that the Policy grants Probst coverage for the damages that are the subject of this Complaint pursuant to Wis. Stat. § 806.04(2);
- b. An award of all taxable costs and disbursements allowed by law;
- c. An award of attorney fees associated with the investigation and prosecution of this wrongful coverage denial pursuant to Wis. Stat. § 806.04(8); and
- d. Such other relief as may be just and appropriate.

PLAINTIFF HEREBY DEMANDS A JURY OF 12 FOR ALL MATTERS SO TRIABLE.

Dated this 21 st day of September, 2023.

AXLEY BRYNELSON, LLP

Electronically signed by Arthur E. Kurtz

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